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Nos. 91-617, 91-618, 91-619

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TONY AVIRGAN, *et al.*,
Petitioners,

v.

JOHN HULL, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' JOINT CONSOLIDATED SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS FOR LEAVE TO FILE AND RESPONSE TO BRIEFS *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE AND NATIONAL COUNCIL OF CHURCHES OF CHRIST, *et al.*

JACK MCKAY, ESQ.
(Counsel of Record)
JANE M. SULLIVAN, ESQ.
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8439
Attorneys for Respondent Theodore G. Shackley and on behalf of Respondents Calero, Clines, Delamico, Gonzalez, Hakim, Hull, Martin, McCoy, Nunez, Owen, Quintero, Secord, and Singlaub

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SUMMARY OF THE ARGUMENT

This case raises none of the policy issues cited by the *amici*. Sanctions for filing a frivolous suit and maintaining it with a false affidavit of counsel do not retard the pursuit of justice by litigants or lawyers, whether private or public.

This litigation was not, as *amici* contend, a suit for personal or business injuries allegedly suffered by petitioners Avirgan and Honey. It was the Christic Institute's effort to conduct its own Iran/Contra investigation and inquiry into 30 years activity of the "Secret Team." In their rush to use the La Penca bombing as a vehicle for such an investigation, petitioners ignored the fact that they had only rumor and innuendo on which

to base allegations that the defendants were responsible for that bombing. This misconduct was compounded by the filing of the deceptive Sheehan affidavit in an effort to hide this deficiency.

The extent of petitioners prefiling investigation cannot excuse the absence of a basis to believe that causation could be proved. The district court properly sanctioned the petitioners for their misconduct in filing the suit and perpetuating it by the Sheehan Affidavit—misconduct that went far beyond the "every day" activities of lawyers in federal court.

BACKGROUND OF THE CASE

Given the conflicting and inaccurate presentation of the nature of this case in the brief offered for filing by *Amicus* National Council of Churches ("Churches"), some further background of the litigation and its conduct is necessary. This case was *not* filed or pursued as a claim for injuries to the individual plaintiffs as Churches suggests.[1] Rather, Mr. Sheehan and the Christic Institute brought this case in order to use the subpoena power of the federal courts to conduct their own Iran/Contra investigation.

Mr. Sheehan made clear on several occasions that, prior to the La Penca bombing, he was an attorney with a cause searching for a way to commence litigation to investigate events in Central America.[2] He saw the

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[1] Petitioners' damages were minimal, in any event. Tony Avirgan's alleged damages from the bombing amounted to an injured finger, lost income, and lost camera equipment, for which he was compensated by his employer's insurance carrier. The only damages his wife, Martha Honey, allegedly incurred from the bombing were lost income and loss of consortium.

[2] In a speech reprinted in D. Sheehan and D. Ortega, *Assault on Nicarauga*, Mr. Sheehan stated that he learned that military equipment

> was going to the farm of a millionaire rancher down in Costa Rica. This rancher is a man by the name of John Hull, who had become the major ally for the Contras there. Well, we were

La Penca bombing as providing access to the federal courts for this purpose. Mr. Sheehan and the Christic Institute relied on rumor and speculation to allege a connection between the La Penca bombing and arms shipments to Central America [3] and between the defendants and Colombian drug lords [4] so that they could plead a cause of action and provide themselves a case that would generate fund raising.

Petitioners' conduct of discovery further demonstrated that this suit was not filed to compensate plaintiffs for their alleged injuries. Petitioners conducted discovery in a desultory manner until March 1988, when the district court denied their motion to continue the June 1988 trial date. Over 120 deposition notices were then served during the last two months before the May 1988 discovery cut-off.

Although they deposed alleged "key" defendants only at the last moment or not at all, petitioners sought many

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quite distressed by this and felt that we should hurry up and find ourselves a client . . . .

(R38.1213 Ex. F. at 17.)

[3] In this connection, the contention of *Amicus* Churches that the La Penca bombing "was the result of shipments of explosives from the United States into Costa Rica" (Churches Brief 11) is contrary to the evidence in the case and the ruling of the district court, which found that plaintiffs made "no showing" that the kind of explosives defendants were allegedly transporting could be "directly, or indirectly, traced to the explosive used at La Penca." *Avirgan v. Hull*, 691 F. Supp. 1357, 1374 (S.D. Fla. 1989).

[4] For example, at the initiation of the lawsuit and at numerous times throughout the litigation, the petitioners publicy alleged that defendants had combined with Colombian drug kingpins (such as Pablo Escobar and Jorge Ochoa) to form the alleged criminal enterprise responsible for the La Penca bombing. (*See, e.g.*, R4.141.38-39; R4.150.32.) However, at deposition, plaintiffs admitted no knowledge of any connection between these drug kingpins and the other defendants. (R45.1202.293-94.) Indeed, plaintiffs' filings in opposition to defendants' motions for summary judgment indicated that plaintiffs had no proof of a connection with the drug lords. (R17.635; R32.1082; R33.1099; R33.1102; R34.1113; R34.1130; R36.1157; R37.1176; R39.1268.)

high-publicity depositions in their last-minute discovery. Petitioners deposed or noticed the depositions of Oliver North, Fawn Hall, the Offices of the President and Vice-President, a dozen federal agencies, and Vice-President George Bush's son and security advisor. The depositions were publicized in the monthly Christic Newsletter and telephone "hotline." Readers of the Christic Newsletter were urged to write their congressman to call attention to the "numerous criminal acts" being uncovered by the Christic Institute. *See, e.g.*, Christic letter, *infra* note 5. The depositions were scheduled to coincide with the beginning of the presidential campaign, and readers were asked to "bring up" the Christic lawsuit as part of the electoral process. (R37.1178 Ex. E.)

While discovery lagged, the fund-raising and publicity efforts of the Christic Institute were in full swing. Pleadings in the case were sold by the Institute to raise money. For example, the Sheehan Affidavit (with photos) was available for $10.00. The complaint could be purchased for only $5.00. Plaintiffs' La Penca report was $8.00. Buttons, decals, and bumper stickers were $1.00 each ($.50 for orders over 100). (R37.1179 Ex. E.) Frequent mailers emphasized the Christic Institute's world-wide investigation.[5]

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[5] The following letter dated April 24, 1987 from the Christic Institute is an example.

> Dear Friend:
>
> Would you like to subpoena, question under oath, and prosecute the Secret Team working with Oliver North? With the help of supporters like yourself, we at The Christic Institute can do just that.
>
> * * * *
>
> We are the only private investigation with federal subpoena power, and our investigation has tracked the Secret Team's racketeering activities through Cuba, Southeast Asia, Libya, Chile, and Central America.
>
> * * * *
>
> The Christic Institute will put over 100 people under oath to develop the record of truth during the coming months. We

As the foregoing shows, petitioners, fueled by their extensive fund raising, used the scarce judicial resources of the federal courts not to obtain compensation for plaintiffs, as *Amicus* Churches contends, but rather to conduct their own Iran/Contra investigation. The need to stretch from support for the Contras to responsibility for the La Penca bombing caused petitioners to engage in sanctionable conduct as a necessary foundation for that private inquiry.

ARGUMENT

I. THIS CASE RAISES NONE OF THE POLICY ISSUES ADDRESSED BY THE *AMICI*

Contrary to the contentions of the proposed *amici*, this case does not involve the ability of plaintiffs to pursue justice, the chilling of public interest law, or the independence of the judiciary. Petitioners—plaintiffs Avirgan and Honey, their counsel, Daniel Sheehan, and his "law firm," the Christic Institute—were sanctioned not because they could not eventually prove their case nor because their suit was embarrassing to high-ranking government officials. Rather, they were sanctioned for filing and pursuing a case through two years of costly and irrelevant discovery on the basis of a frivolous complaint and the false Sheehan Affidavit. *Avirgan v. Hull*, 125 F.R.D. 189, 190 (S.D. Fla. 1989) (J. App. I, 51-A). *Amici* do not, and cannot, contend that lawyers and litigants may, with impunity, make misrepresentations to

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have doubled our staff to handle the litigation, public education, and organizing task before us. To bring the truth about La Penca and the Secret Team to the American people is a very expensive undertaking. Your generous contribution will help make this effort possible.

Drugs and assassination programs never serve the cause of democracy. Let's put a stop to them. Together we can win justice for the La Penca victims, expose the criminality of federal officials and stop the Secret Team. Thank you for your concern and participation.

(R10.405 Ex. A.)

federal courts or file and pursue frivolous suits based on such misrepresentations. Accordingly, the sanctions imposed on petitioners for such misconduct will not retard the pursuit of justice.

Moreover, neither one's status as a public interest law firm nor the nature of one's clients confers immunity from sanctions for bringing or maintaining frivolous suits and certainly not for filing false affidavits. The Second Circuit has rejected "out of hand" the claim that "special treatment of sanctions should be given to attorneys who handle unpopular civil rights claims, particularly those representing indigents and minorities." *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). As the court in *Oliveri* held:

> All attorneys are to be held to the same standards of conduct, no matter who their clients are. . . . Underlying the various rules imposing sanctions for attorney misconduct is a premise that all attorneys are expected to conduct themselves and their lawsuits according to the standards necessary for the proper, efficient functioning of our legal system.

Id. at 1280-81; *see also Roadway Express v. Piper*, 447 U.S. 752, 762 (1980) ("Dilatory practices of civil rights plaintiffs are as objectionable as those of defendants.")

II. THE EXTENT OF PETITIONERS' INVESTIGATION DOES NOT EXCUSE THEIR FAILURE TO HAVE A REASONABLE BASIS TO FILE SUIT

The contention of *Amicus* Trial Lawyers for Public Justice ("Trial Lawyers") that petitioners conducted an "extensive" and "extraordinary" prefiling investigation (Trial Lawyers Brief 1, 2) is irrelevant to whether they violated Rule 11's requirement that every signed paper be "well grounded in fact." Quality not quantity is required. It is not the length of an investigation, but the result, that matters.[6]

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[6] Equally irrelevant are the indictments, convictions and reversals cited by Churches and the repeated references in its brief to

Rule 11 requires the signer to engage in a two-step process before asserting factual positions. First, the signer must conduct a reasonable prefiling investigation of the facts. *Donaldson v. Clark*, 819 F.2d 1551, 1555 (11th Cir. 1987). Second, upon reviewing the results of that investigation, the signer must reasonably believe that the position is "well grounded in fact . . . and not interposed for any improper purpose." Fed. R. Civ. P. 11. The reasonableness of the belief is judged under an objective standard. Thus, the complaints and all subsequent papers signed by Mr. Sheehan should have been well grounded in fact, regardless of the prefiling investigation.

Petitioners' two-year prefiling investigation, allegedly involving interviews of hundreds of witnesses, and petitioners' failure to unearth any competent evidence linking defendants to the La Penca bombing, should have led them to conclude that the allegations against respondents were not reasonable. Given Mr. Sheehan's allegedly extensive trial experience in complex litigation (R4.141), the groundlessness of the complaints should have been even clearer to him. Likewise, petitioners could not have reasonably believed that the Sheehan Affidavit—with its unknown, nonexistent, and dead "sources," its fabricated testimony, and the deceptive style that masked its shortcomings—was well grounded in fact.

The most telling evidence of the lack of a reasonable basis for filing suit and of the falsity of the Sheehan

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wrong-doing in "high places." Petitioners were not sanctioned in this case because of lack of a reasonable basis to believe that arms shipments were made to Central America or that government officials may have lied to Congress. Oliver North, John Poindexter, Robert McFarlane, Jose Fernandez, and other government officials named by Churches were not even parties to this suit. Conversely, having a reasonable basis to believe that arms shipments were made to the Contras or that false testimony was given to Congress does not justify naming 29 defendants as responsible for the La Penca bombing.

Affidavit was the sworn affidavit of Carl Jenkins. In his affidavit, Mr. Jenkins recounted his conversation with Mr. Sheehan during which Mr. Jenkins objected to certain information attributed to him in the Sheehan Affidavit:

> At the time Mr. Sheehan said to me that he was not concerned with the actual state of my knowledge an [sic] that he was using the affidavit simply to keep the case in court so that he could take discovery to prove the story. He further told me that he would drop sources such as me once he had developed hard sources. He also told me that the list of defendants whom he had sued was likely too large and that his intent was to use discovery to trim the list to those whom he thought were the real criminals.

(R16.595 Ex. D-1.)

III. THE DISTRICT COURT APPLIED THE APPROPRIATE RULE 11 STANDARD

Amicus Churches contends that the district court "held that a plaintiff must possess admissible evidence sufficient to prove their [sic] case *prior* to the filing of a complaint and discovery." (Churches Brief 4.) To the contrary, the district court found the allegations in the complaint were "based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." 705 F. Supp. at 1545 (J. App. I, 33-A). Such "evidence" does not constitute a sufficient factual basis under Rule 11.[7] *See, e.g.*, Judge Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985); *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 207 (E.D. Ky. 1987); *Kendrick v. Zanides*, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985); *Miller v. Schweickart*, 413 F. Supp. 1059, 1061 (S.D.N.Y. 1976).

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[7] Nor does the result of John Hull's criminal libel trial, as *Amicus* Trial Lawyers (Trial Lawyers Brief 1-2) suggests. As respondents have already explained in their joint consolidated brief in opposition to the petitions, the Costa Rican court held only that Avirgan and Honey lacked the necessary intent to injure required to sustain the criminal charges. (R3.103.)

Furthermore, the district court did not sanction the petitioners solely because they could not survive summary judgment on the issue of causation, as *Amicus* Trial Lawyers contends. (Trial Lawyers Brief 4.) Rather, petitioners were sanctioned because they filed this case on the basis of rumor and innuendo and then maintained it by filing a false affidavit. Such frivolousness and deception were not involved in the *Matsushita* decision cited by Trial Lawyers.

Likewise, petitioners were not entitled to special consideration because of the circumstances of their prefiling investigation. The La Penca investigation was conducted by two journalists on the scene in Costa Rica. Information on La Penca was in Central America, not in the United States. Petitioners themselves have characterized the investigation as "massive" and *Amicus* Trial Lawyers calls it "extraordinary." Neither time [8] nor geography was responsible for the failure of petitioners' investigation to produce a reasonable basis to tie these defendants to La Penca.

Finally, *Amicus* Trial Lawyers also suggests that petitioners' failures of proof are the sort of "things that happen in litigation throughout the federal courts every day." (Trial Lawyers Brief 3.) To the contrary, lawyers do not submit false affidavits; they do not fabricate witnesses and testimony; they do not seek protection for dead, nonexesistent, or unlocatable witnesses; they do not sue all possible defendants until they can determine whom to drop; they do not pay their main witness; [9] and they do not pay their clients.

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[8] The suggestion that petitioners' prefiling investigation was rushed because of a presumed two-year limitations period in bringing RICO claims is raised for the first time by *Amicus* Churches (Churches Brief 13), and a two-year limitations period was not argued by respondents in the court of appeals.

[9] In his deposition, petitioners' chief witness, Mr. Wheaton, admitted receiving at least $15,000-$20,000 *in cash* from the Christic Institute for "reimbursement" for his expenses, although he kept no records of expenses or payments. (R18.656, Ex. C at 621-24.)

CONCLUSION

For the foregoing reasons, the motions to file *amicus* briefs in support of petitioners should be denied. Furthermore, the *amicus* briefs provide no justification for granting the petitions of Mr. Sheehan, the Christic Institute, and plaintiffs Avirgan and Honey for writs of certiorari.

Respectfully submitted,

JACK MCKAY, ESQ.
(Counsel of Record)
JANE M. SULLIVAN, ESQ.
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8439
Attorneys for Respondent Theodore G. Shackley and on behalf of Respondents Calero, Clines, Delamico, Gonzalez, Hakim, Hull, Martin, McCoy, Nunez, Owen, Quintero, Secord, and Singlaub